IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

L.Rs. of Bhabhoot Ram vs. Jumman & ors.

S.B.Civil Second Appeal No.72/1984 against the judgment and decree dated 3.2.1984 passed by Civil Judge,Sojat in Civil appeal(Decree) No.3/1983.

Date of Judgment: January 23, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr.K.C.Samdaria for the appellants.

BY THE COURT:

The appellant is aggrieved against the judgment and decree dated 31.3.1978 passed in Civil Original Suit No.87/71 by which the trial court dismissed the suit of the plaintiff filed for possession and the appellant is also aggrieved against the judgment and decree dated 3.2.1984 dismissing the appeal of the appellant.

Brief facts of the case are that the plaintiff filed the suit for possession of piece of land measuring 10 yards x 20 yards on the allegation that the plaintiff was in possession of a plot measuring 30 yards x 20 yards. He raised some *padwa* leaving some open land also. He

enclosed the land in the year 1947 and while living in that temporary structure, the plaintiff submitted an application before the Gram Panchayat on 25.6.1960 for obtaining the *Patta* of the land in view of the fact that he already had a possessory title. The plaintiff deposited the requisite amount of Rs.150/- in the Gram Panchayat on 17.9.1968 after recommendation of grant of Patta in favour of the plaintiff. However, till the suit was filed, no Patta was issued in favour of the plaintiff. The plaintiff's allegation is that the defendants removed the plaintiff's fencing on 29.7.1970 and encroached upon the land measuring 20 yards x 10 yards. It is pleaded by the plaintiff that the plaintiff was not in the house at that time but his wife was very much there but his wife could not resist the illegal act of the defendants. The defendants, therefore, filed the present suit for recovery of the piece of land measuring 400 sq.yards. However, it will be relevant to mention here that in the sketch map annexed with the plaint Ex.1, the land in possession of the defendants has been shown to be 10 yards x 20 yards only.

The defendants submitted written statement and pleaded that for the land in question Patta was issued in favour of the defendants' ancestors by the *Thikana* of village on 7.4.1935.Thereafter the house was constructed and the said house was gifted to defendant Abdul by a

deed dated 29.11.1943. The defendants also submitted that the plaintiff gave wrong description of the property. The defendants also submitted that according to their Patta, the total land is 20 yards x 30 yards. The defendants also denied the possession of the plaintiff as well as his putting fencing enclosing the land. The defendants even submitted that in the portion where the plaintiff is residing, was given to the plaintiff by the defendants on plaintiff's request. The defendants also submitted that when the plaintiff tried to obtain the Patta further, then they disputed before the Panchayat. They raised objection and thereafter preferred appeal against the order of the Panchayat. In the trial court, both the parties led their evidence. The trial court framed the issues whether the plaintiff was in possession of the property in question since 1947 and whether any proceedings for grant of Patta in favour of the plaintiff before the Gram Panchayat is pending, whether the defendants encroached upon the plaintiff's land shown in the map ABCD on 29.7.1970 after removing the fencing, whether the plaintiff took possession of the temporary *padwa* from the defendant Abdul and lastly whether the defendants got the property by gift-deed dated 29.11.1943.

The learned counsel for the appellant vehemently submitted that the courts below committed serious error of law in admitting the gift-deed dated 29.11.1943 in evidence and in relying upon the said

document. According to the learned counsel for the appellant, admittedly the gift-deed dated 29.11.1943 is not a registered document and, therefore, no title has passed to the defendants by this deed. Apart from it, according to the learned counsel for the appellant, the defendants failed to prove that the donor had any title of the property in dispute, therefore, also the defendants had not become the owner of the property. The learned counsel for the appellant vehemently submitted that the plaintiff produced several witnesses who stated on oath that the plaintiff was in possession of the property and the defendants encroached upon the plaintiff's piece of land in the year 1970. According to the learned counsel for the appellant, even if an oral gift is permissible under the Mohammedan Law even then if a deed is executed by a Mohammedan, gifting some immovable property then that deed requires registration. This aspect was not properly considered by the two courts below.

I heard the learned counsel for the appellant and perused the record also.

The only following substantial question of law was framed by this Court while admitting this appeal on 20.9.1984:-

> *(1) Whether a gift deed not registered and properly stamped should not have been admitted and the trial court having admitted it, the judgment is vitiated."*

Before deciding substantial question of law, it will be appropriate to recapitulate the facts of the case. The appellant filed suit for recovery of the possession of the disputed property on the basis of possessory title. Therefore, for getting the possession of the property from trespasser, one is required to prove his prior possession and his dispossession from the property by the defendants. In this case, the two courts below concurrently held that the plaintiff failed to prove his prior possession. No substantial question of law has been framed by this Court while admitting this appeal on 20.9.1984 about challenge to this finding and it appears that no application has been filed by the appellant for framing any issue to challenge the finding of fact recorded by the two courts below. The learned counsel for the appellant submitted that this Court has ample power to frame substantial question of law even at the time of hearing of the appeal. It is true that this Court has power to frame substantial question of law if it arises in the case. After going through the facts of the case and after going through the evidence of the parties, this Court is of the view that the two courts below carefully considered the evidence of the witnesses produced by the plaintiff himself and found that the witnesses either were interested in the plaintiff or inimical to the defendants, hence they are not reliable. Therefore, this finding of fact is binding upon this Court and there is no illegality found by this Court from the finding of fact recorded by the

two courts below.

In view of the above fact alone, it is absolutely irrelevant whether the defendants had any title to the property or not. It is for the plaintiff to prove that he was in possession of the property and he was wrongly dispossessed by the defendants. When the plaintiff failed to prove his right to seek possession then the defendants' title or no title is not relevant. The plaintiff's suit was liable to be dismissed only on the basis of the finding recorded by the two courts below on issue nos.1 and 2. In view of the above facts, the substantial question of law framed by this Court does not arise in this appeal as it will not affect the result of the appeal or the suit in any manner.

In view of the above discussion, the appeal of the appellant is dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.